Supreme Court, U.S.
FILED
FEB 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INEXCO OIL COMPANY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY AND JOHN S. HERRINGTON, SECRETARY OF ENERGY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

REPLY BRIEF OF PETITIONER INEXCO OIL COMPANY

ROGER RIDER
Counsel of Record
THOMAS W. HOUGHTON
RONALD J. BIGELOW
THOMAS M. FARRELL
MAYOR, DAY & CALDWELL
P.O. Box 61269
Houston, Texas 77208
(713) 225-7000
STANLEY K. HATHAWAY
HATHAWAY, SPEIGHT AND KUNZ
One Pioneer Center
2424 Pioneer Avenue
Cheyenne, Wyoming 82001
(307) 634-7723
Attorneys for Petitioner
Inexco Oil Company

TABLE OF AUTHORITIES

Cases	Page
Asarco, Inc. v. EPA, 616 F.2d 1153 (9th Cir. 1980)	7
Atlantic Richfield Co. v. DOE, 769 F.2d 771 (D.C. Cir. 1984)	2, 4
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971)	6
Bray v. United States, 423 U.S. 73 (1975) (per curiam)	2, 4
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)	7
Coastal States Marketing, Inc. v. New England Petroleum Corp., 604 F.2d 179 (2d Cir. 1979)	2
DOE v. Osborn, 760 F.2d 282 (TECA 1984)	5, 6
Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275 (D.C. Cir. 1981)	7
Exxon Corp. v. DOE, 91 F.R.D. 26 (N.D. Tex. 1981)	7
Grigsby v. DOE, 585 F.2d 1069 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979)	5, 6
Gulf Oil Corp. v. DOE, 639 F.2d 766 (TECA 1981)	2
Inexco Oil Co., 7 DOE ¶ 83,015 (1981)	5
Mountain Fuel Supply Co. v. DOE, 656 F.2d 690 (TECA 1981)	5, 6
Mountain Fuel Supply Co. v. Johnson, 586 F.2d 1375 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979)	2
Scallop Corp. v. Tully, 705 F.2d 645 (2d Cir. 1983)	2, 4
Texaco Inc. v. DOE, 616 F.2d 1193 (TECA 1979)	2, 4
United States v. Uni Oil, Inc., 646 F.2d 946 (5th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982)	3
United States v. Wyatt, 680 F.2d 1082 (5th Cir. 1981)	2

Statutes	
Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note	1
Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 *et seq*	1

Miscellaneous	
4 K. Davis, *Administrative Law Treatise* §§ 21:1, 21:2, 21:6 & 21:7 (1983)	6
Restatement (Second) of Judgments §§ 34 and 83 (1982)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INEXCO OIL COMPANY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY AND JOHN S. HERRINGTON, SECRETARY OF ENERGY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

REPLY BRIEF OF PETITIONER INEXCO OIL COMPANY

Respondents have mischaracterized the law concerning the scope of the jurisdiction of the Temporary Emergency Court of Appeals ("TECA") and TECA's improper use of *res judicata* below.

I.

Respondents suggest that TECA had jurisdiction of this mandamus proceeding because it concerns information "related to" claims under the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 note, and/or the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. §§ 751 *et seq.*; because it "involved" the ESA or EPAA; and because TECA would have exclusive appellate jurisdiction of an appeal from a final judgment in an underlying controversy concerning the proper construction, applicability or effect of the ESA,

EPAA or regulations promulgated thereunder. DOE Mem. at 4-5. In *Bray v. United States,* 423 U.S. 73 (1975) (per curiam), this Court properly and emphatically rejected any suggestion that the foregoing factors invested TECA with jurisdiction over the appeal of that criminal contempt order. Respondents would limit *Bray* strictly to criminal contempt proceedings. DOE Mem. at 4-5. Inexco contends that this Court's analysis in *Bray* should be applied outside the criminal contempt context. Pet. at 8-12. Whatever the outcome on this question, this Court should issue a writ of certiorari in this case to resolve the intra- and inter-court conflict generated by TECA's decision below.

If Inexco is correct, the decision below must be vacated in order to preserve the substantial agreement among the appellate courts on the question of the proper scope of TECA's jurisdiction. The courts of appeals have held that TECA does not necessarily have jurisdiction over the entirety of a case involving matters arising under the ESA or EPAA, but only over those specific issues on appeal which arise under the ESA or EPAA and have been decided by the district court on that basis. *Texaco Inc. v. DOE,* 616 F.2d 1193, 1196-98 (TECA 1979); *Coastal States Marketing, Inc. v. New England Petroleum Corp.,* 604 F.2d 179, 187 (2d Cir. 1979). They have held that it is not enough that the underlying controversy has involved (or will or may involve) issues arising under the ESA or EPAA; the reviewing court must make its jurisdictional determination by reference solely to the specific issues presented to it. *Gulf Oil Corp. v. DOE,* 639 F.2d 766, 766-67 (TECA 1981). Moreover, under this analysis, an issue "arises under" the ESA or EPAA only if it "involve[s] the construction, applicability or effect" of either of those statutes or the regulations promulgated thereunder. *Atlantic Richfield Co. v. DOE,* 769 F.2d 771, 778-80 (D.C. Cir. 1984). *See Scallop Corp. v. Tully,* 705 F.2d 645, 647-49 (2d. Cir. 1983); *Mountain Fuel Supply Co. v. Johnson,* 586 F.2d 1375, 1382 (10th Cir. 1978), *cert. denied,* 441 U.S. 952 (1979); *see also United States v.*

Wyatt, 680 F.2d 1080, 1083-1085 (5th Cir. 1982); *United States v. Uni Oil, Inc.,* 646 F.2d 946, 950-51 (5th Cir. 1981), *cert. denied,* 455 U.S. 908 (1982).

Careful review of the district court's order below (*see* Pet. App. B) reveals that that court did not (and did not need to) adjudicate an EPAA issue. In that order, the district court made more than 25 separate citations to authorities addressing the proper application of the discovery provisions of the Federal Rules of Civil Procedure. Furthermore, the district court made at least 63 separate, express adjudications regarding the construction, applicability and effect of the discovery provisions of the Federal Rules of Civil Procedure, focusing on the inadequacy of Respondents' attempts to bring themselves within the scope of the pre-decisional, deliberative-process privilege.

In the entire 36 pages of the original order, however, there is not one citation to the ESA or the EPAA. Nor is there any decision by the district court below, express or implied, regarding the construction, applicability or effect of any provision of the ESA, EPAA or regulations promulgated thereunder. The court's few references to EPAA-related regulations note only the existence of the regulations or the possible existence of controversy regarding the meaning of the regulations. There is no attempt to resolve any controversy regarding the meaning of those regulations.

Respondents' attempt (DOE Mem. at 5 n.2) to distinguish the cases cited in Inexco's Petition is wholly inconsistent with their analysis elsewhere in the Memorandum. Each of those cases in some way "involved" or was "related to" the EPAA and, in at least three of the cases, final judicial resolution of the underlying controversy would require adjudication of an EPAA issue. In each case, however, the appellate court held that TECA did not have jurisdiction because the particular issue then on appeal did not involve the construction, applicability or effect of the ESA, EPAA or regulations promulgated thereunder. *See* Pet. at 8-11.

Respondents have suggested (DOE Mem. at 5-6) that the discovery issues in this case will, whatever the means chosen to obtain appellate review, be reviewable only in TECA. Nothing is further from the truth. Respondents have avoided mentioning the route chosen in *Bray* (appeal of a conviction for criminal contempt) where, by the express holding in *Bray*, jurisdiction lies only in the circuit court of appeals. Moreover, if the district court were to render judgment for Inexco as a sanction for Respondents' refusal to produce the documents, appeal of that judgment would not, as Respondents assert, "unquestionably" be to TECA — jurisdiction would lie in TECA only if the district court adjudicated an ESA issue in reaching its judgment (which is unlikely, as the district court would have rendered judgment as a discovery sanction, not on the basis of an interpretation or application of the ESA or the EPAA), and then only if the discovery issues on appeal were so intertwined with the ESA/EPAA issues as not to give rise to the need for a bifurcated appeal. *Atlantic Richfield Co. v. DOE*, 769 F.2d 771, 778 (D.C. Cir. 1984); *Scallop Corp. v. Tully*, 705 F.2d 645, 650 (2d Cir. 1983); *Texaco Inc. v. DOE*, 616 F.2d 1193, 1197-98 (TECA 1979).

In view of the foregoing, Inexco contends that TECA's decision below cannot be reconciled with the cases cited above. This Court should vacate TECA's order to restore consistency among the courts of appeals.

On the other hand, if Respondents are correct, *all of the foregoing cases are wrong*. In that unlikely event, this Court should take this opportunity to reject the analysis of those cases and declare that, except in the criminal contempt context, TECA has exclusive appellate jurisdiction of all cases that in any way "involve" or are "related to" the ESA or EPAA. Inexco submits that any such decision by this Court would generate all of the problems that this Court sought to lay to rest in *Bray*.

II.

TECA's decision on the merits of this interlocutory mandamus proceeding creates dangerous precedent that would be applicable to all proceedings in the federal judicial system for

review of administrative agency adjudications. Respondents now purport to give TECA's decision a narrow, innocuous reading. The actual decision, however, is not so limited. Accordingly, DOE and other federal agencies subsequently will be able to cite TECA's decision for two propositions that heretofore would have been unthinkable in American jurisprudence.

First, TECA held below that its prior decisions[1] reviewing the administrative interpretations of DOE regulations are irrebuttably binding on Inexco even though Inexco was not a party to any of those prior proceedings and even though those decisions were based upon (and thus limited by) the evidence introduced into the administrative records by parties other than Inexco having litigation objectives and resources different from those of Inexco. That holding is wholly inconsistent with fundamental principles of administrative law. A federal administrative agency may choose to make policy on a case-by-case basis through adjudications involving individual parties, or it may make policy by promulgating rules that are applicable to all entities. However, each avenue imposes certain limitations on the agency. An agency desiring to establish rules having the binding effect of a statute on all regulated entities must comply with statutorily mandated rulemaking requirements, including the requirements of notice to affected parties and an opportunity to comment. If, on the other hand, an agency elects to make policy in individual adjudications rather than rulemakings, the agency must bear the attendant burden of proving its case in each individual adjudication solely on the strength of the evidence in the administrative record of each such case. Both DOE and TECA earlier expressly recognized this limitation on DOE's ability to proceed against Inexco. *Inexco Oil Co.*, 7 DOE ¶ 83,015 at 86,159 n.5 (1981) ("we will not be bound by the *Osborn* determination"); *Osborn*, 760 F.2d at 284, 286 n.6. ("the specific issues of the Inexco case are not before us"). Remarkably, TECA now ignores the limitation.

---

[1] *DOE v. Osborn*, 760 F.2d 282 (TECA 1984); *Mountain Fuel Supply Co. v. DOE*, 656 F.2d 690 (TECA 1981); *Grigsby v. DOE*, 585 F.2d 1069 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979).

Moreover, due process does not allow DOE to misuse the doctrine of *res judicata* to foreclose all argument by subsequent litigants who were not parties to the previous cases and have had no opportunity to submit evidence or otherwise participate in those prior proceedings. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971). That limitation on *res judicata* is equally applicable to administrative adjudications. *Restatement (Second) of Judgments* § 83(1) and Comment c. at 272 (1982); 4 K. Davis, *Administrative Law Treatise* §§ 21:1, 21:2, 21:6 and 21:7 (1983).

Osborn, Mountain Fuel and *Grigsby* should be given only *stare decisis* effect in this case. The narrow holding in each of those cases was that the private party there failed to demonstrate that there was not substantial evidence in the administrative record to support the agency's decisions. Inexco does not seek reversal of those narrow holdings. Rather, by using evidence and legal argument not contained in the administrative records of those prior proceedings, Inexco seeks the opportunity to demonstrate that the substantial evidence in its own administrative record does not support the same interpretation that had been upheld in the earlier proceedings on the basis of less complete administrative records.

Respondents' suggestion that TECA's decision does not abuse the doctrine of *res judicata* is belied by Respondents' statement that TECA's mandamus ruling "was an appropriate means of *enforcing* [TECA's] prior rulings" in *Osborn, Mountain Fuel* and *Grigsby*. DOE Mem. at 6 (emphasis added). The reviewing court's role in this case is to *decide* this case, not to "enforce" prior decisions against one who was neither a party nor a privy to the prior proceedings.

Second, TECA's decision below improperly precludes Inexco from having a meaningful opportunity (a) to test the completeness of the administrative record presented to the court for review and (b) to contest DOE's *application* of its previously adopted interpretation to the unique evidence that was before the agency in Inexco's case. Respondents blithely assert

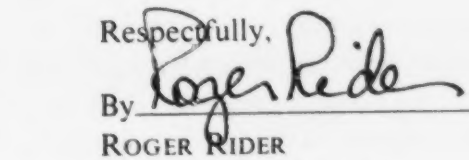
that TECA's "decision simply requires the district court to resolve petitioner's claims on the basis of the administrative record." DOE Mem. at 7. DOE refused to provide the requested information to Inexco during the administrative proceedings. By its decision, TECA has sanctioned DOE's efforts to preclude Inexco from having an opportunity to create a full and fair administrative record. The district court, on the other hand, properly recognized that a reviewing court is not bound by an incomplete record, but may permit supplementation as necessary to ensure plaintiff the opportunity of having meaningful judicial review of a full and complete administrative record. Pet. App. B-21. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-21 (1971) ("the bare record may not disclose the factors that were considered"); *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) (court may consider evidence that clarifies and explains the administrative record); *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1158-60 (9th Cir. 1980) (reviewing court not "straight jacketed" to the compilation of documents forwarded to it by the agency under the guise of the "administrative record," but may consider evidence indicating that the agency failed to consider relevant factors); *Exxon Corp. v. DOE*, 91 F.R.D. 26, 32-36, 40 (N.D. Tex. 1981) (court may permit discovery and presentation of evidence of, among other things, contemporanous construction of a regulatory term).

The documents requested by Inexco are logically probative not only of the proper interpretation of the term "posted price," but also of the proper *application* of that term to particular circumstances, such as those set forth in the administrative record in this case. Although TECA did not separately address the issue below, Respondents concede that the application question remains in the case. DOE Mem. at 6. Accordingly, even if the requested documents were not relevant to the interpretation question, the documents still would be relevant to the equally important question of the proper application to Inexco. On this relevance point TECA and Respondents have remained curiously silent.

III. Conclusion

The petition for a writ of certiorari should be granted.

Respectfully,

By 

ROGER RIDER
Counsel of Record
THOMAS W. HOUGHTON
RONALD J. BIGELOW
THOMAS M. FARRELL
MAYOR, DAY & CALDWELL
P.O. Box 61269
Houston, Texas 77208
(713) 225-7000

STANLEY K. HATHAWAY
HATHAWAY, SPEIGHT AND KUNZ
One Pioneer Center
2424 Pioneer Avenue
Cheyenne, Wyoming 82001
(307) 634-7723
Attorneys for Petitioner
Inexco Oil Company

CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served with a copy of the foregoing document have been served. A copy of the foregoing document was mailed postage prepaid by first class mail to each of the following:

Solicitor General
Department of Justice
Washington, D.C. 20530

Thomas C. Newkirk
Larry P. Ellsworth
Thomas H. Kemp
Charles L. Cope
Rodney L. Solenberger
U.S. Department of Energy
Office of General Counsel
1000 Independence Avenue, S.W.
Washington, D.C. 20585
(202) 252-5411

The Honorable Clarence A. Brimmer
Chief Judge of the United States District
Court for the District of Wyoming
P.O. Box 985
Cheyenne, Wyoming 82001

ROGER RIDER